Local 299, International Brotherhood of Teamsters, AFL–CIO *and* Overnite Transportation Company. Cases 7–CB–10490 and 7–RC–20512

August 19, 1999

DECISION, ORDER, AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On October 5, 1995, Administrative Law Judge Peter E. Donnelly issued the attached decision. The Charging Party Employer filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings,[1] findings, and conclusions[2] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Local 299, International Brotherhood of Teamsters, AFL–CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time drivers, dock workers, mechanics and switchers, employed by the Employer at its facility located at 6150 South Inkster Road, Romulus, Michigan; but excluding all professional employees, confidential secretaries, leadmen, guards and supervisors as defined in the Act.

MEMBER HURTGEN, dissenting.

Contrary to the judge and my colleagues, I find that the Respondent Union engaged in objectionable conduct and violated Section 8(b)(1)(A) of the Act.

On election day, the Respondent Union organized a rally in front of the Employer's facility. The Respondent and its agents took pictures of that rally and of employees arriving and leaving the Employer's facility. However, on election day, there were two rallies—the Respondent's rally and a separate pro-company "vote no" rally. The Respondent and its agents took pictures of both rallies. The Respondent thereby effectively made a permanent record of the employees' choice of standing with the Respondent's supporters or standing with the "vote no" employees. The Respondent offered no benign explanation for its actions.[1] Accordingly, anti-Respondent employees could reasonably fear that a permanent record was being made of their choice to refrain from union activity. Thus, consistent with well-established law before *Randell Warehouse of Arizona,* 328 NLRB No. 153 (1999), and with my dissent in that case, I would sustain the Employer's Objection 3.[2] I would also find that the Respondent's action restrained and coerced employees in violation of Section 8(b)(1)(A).

Jerome Schmidt, Esq., for the General Counsel.
William Bradford, Esq., of Farmington Hills, Michigan, for Respondent.
Jeffrey L. Madoff, Esq., of Chicago, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PETER E. DONNELLY, Administrative Law Judge. Pursuant to a Stipulated Election Agreement (Case 7–RC–20512), an

[1] Contrary to the Charging Party Employer, we find that the judge did not err by granting the General Counsel's motion to amend the complaint only with regard to minor corrections, and by denying the General Counsel's motion to adduce additional evidence regarding the allegation that the Respondent had violated Sec. 8(b)(1)(A) of the Act. In doing so, we note that the alleged 8(b)(1)(A) violation and the Employer's objections are based on substantially identical conduct; that the Employer, as the objecting party, had the opportunity to, and did, introduce evidence in support of its objections; and that the parties were not prejudiced by the judge's rulings.

[2] In adopting the judge's decision, we rely on the Board's recent decision in *Randell Warehouse of Arizona,* 328 NLRB 1034 (1999), which issued subsequent to the issuance of the judge's decision. *Randell Warehouse* overruled *Pepsi-Cola Bottling Co.,* 289 NLRB 736 (1988), relied on by the Employer in the instant case, and held that a union's photographing or videotaping of employees engaged in protected activities during an election campaign, in the absence of any express or implied threats or other coercion, is not objectionable.

We affirm the judge's finding that employee Jim Rice's calling employee Larry Schellenberger a "scab" was not objectionable conduct warranting the setting aside of the election. In doing so, however, we do not rely on Schellenberger's testimony about his subjective reaction to Rice's remark. The test for whether objectionable conduct occurred is an objective one, *Picoma Industries*, 296 NLRB 498, 499 (1989), and the subjective reactions of employees are irrelevant to that issue. *Emerson Electric Co.,* 247 NLRB 1365, 1370 (1980), enfd. 649 F.2d 589 (8th Cir. 1981). We find that Rice's third-party conduct was not so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible. *Westwood Horizons Hotel,* 270 NLRB 802, 803 (1984). Indeed, mere name-calling such as that engaged in by Rice does not generally warrant setting aside an election. *Firestone Textiles Co.,* 244 NLRB 168, 171 (1979).

In adopting the judge's conclusion that the Respondent did not violate the Act, we note that the judge inadvertently stated that the evidence did not support an 8(a)(1) violation. The correct provision of the Act is Sec. 8(b)(1)(A).

[1] Union Official Clark testified that pictures were taken for publication in the Union's newspaper. However, he offered no such explanation at the time. In addition, in regard to the antiunion employees, this explanation does not establish a benign purpose. Indeed, the publication of the pictures would tend to further intimidate antiunion employees.

[2] Unlike the judge, I do not find that the Respondent's actions were less coercive because the Employer also took pictures on election day. It may be that the Employer also engaged in objectionable and unlawful conduct. However, that issue is not before us. In any event, it does not justify Respondent's objectionable and unlawful conduct.

election was held on March 15, 1995, between Local 299, International Brotherhood of Teamsters, AFL–CIO (Union or Respondent) and Overnite Transportation Company (Employer or Charging Party), in a unit of drivers, dock workers, mechanics, and switchers at the Employer's Romulus, Michigan terminal.

The Union won the election, and the Employer filed Objections to the election on March 22, 1995. The Employer also filed an unfair labor practice charge (Case 7–CA–10490) on March 28, 1995. Having concluded that the unfair labor practice charge was meritorious, the Regional Director for Region 7 on May 16, 1995, issued a complaint, report on objections, order consolidating unfair labor practice and representation cases for hearing, and notice of consolidated hearing wherein the unfair labor practice complaint and objections were consolidated for hearing.

The complaint consists of a single-unfair labor practice allegation in that "About March 15, 1995, before, during, and after the hours of the polling periods described in paragraph 6,[1] above, pickets of Respondent, in the presence of Respondent's agents, Smith and Clark, took photographs and/or videotaped employees who were entering and leaving the Charging Party's facility.''

The Objections consist of substantially that same allegation and various other contentions as set out in a total of five Objections. The Union filed a timely answer to the unfair labor practice complaint wherein it admitted the facts set out above, but denied that the commission of these acts violated Section 8(b)(1)(A) of the Act. A hearing was held before me on June 27 and 28, 1995. Briefs have been timely filed by Respondent and the Employer.

FINDINGS OF FACT

I. EMPLOYER'S BUSINESS

The Employer is a corporation engaged in the intrastate and interstate transfer of freight with a terminal at Romulus, Michigan. During the past 12 months preceding the filing of the charge, the Employer, in the conduct of its business operations, derived gross revenues in excess of $50,000 from the shipment of freight from its Romulus, Michigan facility directly to points outside the State of Michigan. The complaint alleges, the answer admits, and I find that the Employer is an employer within the meaning of Sections 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE OBJECTIONS AND UNFAIR LABOR PRACTICE ALLEGATION

A. Facts

On the day of the election, March 15, 1995, the employee complement consisted of about 50 local drivers, 35 dock workers and 12 over-the-road drivers.

Early on the morning of the election, Arnold J. (Butch) Clark, an International organizer for the Teamsters with responsibility for organizing the Employer's Romulus terminal, arrived at an area outside of the main gate at about 6:45 a.m. to coordinate and supervise a demonstration of union support. Shortly thereafter he was joined by others. These were off-duty employees of the Employer, union members employed by other employers, and various union officials.

Several witnesses testified that during the day, the size of the group varied from about 20 or 30 to as many as approximately 200 in the early evening hours.

A number of individuals in the group carried signs bearing legends such as "Vote Yes" and "Make the Right Choice." Some of the prounion signs bore the names of other already organized employers indicating their support.

Signs were also stuck in the ground on a line along the road outside the main gate, and a banner was put up outside the terminal entrance bearing the legend "Vote Teamsters for a Better Future."

It also appears that as employees were departing and returning to the facility, either in their trucks or personal vehicles, some in the crowd shouted various prounion remarks such as "Yea Teamsters," "Vote Yes," or "Vote Union." It appears that many in the crowd, particularly nonemployee union members, wore Teamsters' jackets, hats, or other indicia of their union affiliation.

Several drivers testified that after reporting to work, as they were leaving the terminal in their trucks through the fenced entrance at the main gate, individuals with cameras took their pictures. It is undisputed that some individuals in the group outside the gate had cameras and that pictures were taken of some drivers in the cabs of their trucks. Various pictures were also taken of groups of employees within the crowd. Among the various photographs introduced at the hearing were those of six drivers coming out of the main gate in their trucks. All were identified by drivers Steve Bean and Steven Sadler as union supporters; namely, Tony Brewer, Tom Lucas, John Cox, Kenneth Pierce, Terry Tackett, and Robert Hucal.[2] All had been identified to Robert Cecil, terminal manager, by letter dated January 30, 1995, as members of the union organizing committee. It is undisputed that none of these pictures were taken inside the gate or anywhere on the premises of the Employer. It is also not disputed that none of the prounion signs were posted nor any demonstration conducted on company property.

Clark testified that some photographs were taken for publication in the union newspaper and that these were taken by a union photographer. Others were taken by union member Sam Gianpappa. Many of these photographs appear in evidence and were taken, according to Clark, for use in promoting union organizational efforts at other locations, and could also be used as evidence to defend the Union against charges of union misconduct in the event unfair labor practice charges were filed.

Sean Fleming, a local driver, testified that he came to work at about 8:50 a.m. on March 15 and that he voted before leav-

[1] This allegation was amended at the hearing to correctly reference par. 7 of the complaint rather than par. 6.

[2] Respondent admits par. 10 of the unfair labor practice complaint which alleges that before, during, and after the polling hours, "Respondent, in the presence of Respondent's agents Clark and Smith, took photographs and/or videotaped employees who were entering and leaving the Employer's facility." Respondent's responsibility for the conduct of the demonstration, including the photographing, is not in issue. Clark concedes and the record supports the conclusion that he organized, coordinated, and supervised the activities of the demonstrators.

ing on his route, from which he returned at about 6:45 p.m. Fleming testified that as he returned through the main gate, he saw a large number of union supporters with signs outside the gate and that as he drove through, he heard people shouting "Hey Sean,'' and he saw a camera flash and that he believed that his picture was being taken although he did not see any camera.

Ozell Hadley, another local driver, testified that like Fleming, he came to work on the morning of March 15 and voted at about 8:30 a.m. before he left the premises on his route at about 8:45 a.m. As he was passing through the gate, someone yelled his name and gave him a white "Teamster" hat and a "Thumbs Up" sign. At about the same time, Hadley testified that someone, whom he could not identify, took his picture.

With respect to the passage of vehicles through the main gate, the parties stipulated that no effort was made by the demonstrators to impede ingress or egress. However, Employer called Phil McGaha, an over-the-road driver, who testified that after finishing his work and voting on the morning of March 15, as he was leaving the premises in his pickup truck and going through the main gate, he heard a voice which he could not identify, saying, "There's that two faced f—ker" and "Traitor." Later in the day, sometime between 8:30 and 10 p.m., McGaha again returned to the plant through the main gate. As he was entering, he heard a voice say "F—king scab" and "Traitor."

McGaha also testified that at about the same time he was yelled at, a thin spray of some watery-like liquid came onto his windshield. McGaha testified that he paid little attention to it and did not need even to wipe it off since he was under the impression that it was only a spray of spit.

Larry Schellenberger, a dock leadman, testified that as he arrived at the entrance gate at the facility on March 15 to go to work, he heard a fellow employee named Jim Rice yell "Hey, Larry, there's an Overnite scab." Schellenberger also testified that he and Rice "cut up" a lot at work and that they had gone "back and forth" a lot at work and that he had been called a scab by Rice before. According to Schellenberger, the statement "rolled off my back" and he did not feel threatened or coerced concerning his vote.

There were also company supporters inside the terminal property. They were gathered inside the gate and were carrying signs. There were also two large banners on the sides of the building bearing the legend "Support Your Future—VOTE NO." Steve Sadler, a prounion driver, testified that when he walked through the main gate to vote along with Jim Rice and John Stillwagon, as he was going inside the Overnite building where the polls were located, he heard voices from the proemployer group saying "Teamsters suck" and "Vote No" as they walked into the polling place.

It appears that the Employer also took the pictures of the demonstrators. Robert Betz, a supervisor, took still photographs and Ken Johnson, a dock superintendent, took a short video. Although both testified that they limited their photographing to those outside the gate who were also taking pictures, others in the crowd appear in the photos and video.

B. Analysis and Discussion

The Employer contends in Objection 3, in substance, that the Union, by its authorized agents, representatives, and/or supporters

> engaged in unlawful surveillance of employees who were members of the voting unit by videotaping and/or photographing them and by otherwise harassing and intimidating them as they entered upon the Employer's Romulus, Michigan Service Center premises in their personal vehicles to go to work, and to vote, and as they left and re-entered the Service Center premises in vehicles of the Employer in the performance of their work duties.

The probative facts are not in dispute. On March 15, the Union, under the leadership of Butch Clark, conducted a demonstration outside the Employer's premises in an area near the main gate where vehicles, both Overnite and personal cars, came in and out of the terminal. The evidence fails to show, and indeed the parties have stipulated, that none of the vehicles were impeded either coming or going through the gate. It also appears that prounion signs were posted outside the gate and that antiunion signs were posted inside. A smaller group of Employer supporters was gathered inside the gate between the entrance gate and the office building. Pictures were taken by both union and Employer cameramen. Pictures of drivers in Overnite trucks were taken by union cameramen outside the gate as their vehicles departed the premises.

Apparently, it is the position of the Employer that photographing drivers in company vehicles upon leaving the terminal constituted unlawful surveillance sufficient to warrant setting aside the election. I do not agree.

One may speculate that it is intrinsically intimidating in certain circumstances to have one's picture taken in a vehicle since there might be implicit the threat of reprisal, but, in this case, most of those having their pictures taken, as noted above, were known union supporters and cannot reasonably have been intimidated.

Employer contends that the evidence in this case supports, he conclusion, that the election should be set aside and cites *Pepsi-Cola Bottling Co*., 289 NLRB 736 (1988), and *Mike Yurosek & Sons, Inc*, 292 NLRB 1074 (1989), for the proposition that the taking of photographs and videos is a sufficient basis for setting aside the election. In my opinion, there were considerations present in those cases which, for purpose of comparison, distinguish them from the instant case. In those cases, the Board applied the appropriate standard, whether or not the "conduct reasonably tends to interfere with the employees free and uncoerced choice in the election." In both of those cases, the Board concluded that absent any legitimate explanation from the Union, it was reasonable to believe that the Union was "contemplating future reprisals'' and set aside the elections. In the instant case, the same reasoning does not apply since, except for Fleming and Hadley, those photographed were union supporters and it is not reasonable to assume retaliation was planned against them.

Another factor apparently not present in those cases is that here the Employer was itself engaged in the same type of activity as it contends was unlawful when conducted by the Union.

As for Sean Fleming and Ozell Hadley, drivers called by the Employer to testify, both testified that they voted before their pictures were taken, and so it was obviously impossible for the incident to have affected their choice.

In summary, I conclude that photographing drivers in company vehicles outside the company premises, as disclosed by this record, unaccompanied by evidence of coercion or intimidation, is insufficient to constitute unlawful surveillance or misconduct sufficient to set the election aside.

Employer also cites the harassment of McGaha and Schellenberger as sufficient grounds for setting aside the election. I

do not agree. As to McGaha, the record discloses that some individual in the crowd, whom he was unable to identify, called him vulgar, unflattering names. However, these remarks, while certainly offensive, could not have constituted interference inhibiting or affecting McGaha's vote since he had already voted at the time that these remarks were made.

As to Schellenberger, it appears that he and Rice were friends who "cut up" together on the job and that being called a "scab" by Rice was of little concern to Schellenberger. He testified that he did not feel threatened or coerced in his voting on account of Rice's remarks, and while Rice's remarks were perhaps insulting, they were not coercive, particularly in a context of a friendly relationship.

In summary, it is my opinion that the record fails to support the contention of the Employer that the photographing set out in this record constitutes a sufficient basis to set the election aside. Moreover, I also conclude that the probative evidence will not support the contention of the General Counsel and Employer that Respondent violated Section 8(a)(1) of the Act.

IV. OBJECTIONS TO THE ELECTION

Having concluded that there exists insufficient basis for setting aside the election, I shall recommend that the objections be overruled in their totality and that the Union be certified as the collective-bargaining representative of the Employer s employees in the following appropriate unit:

> All full-time and regular part-time drivers, dock workers, mechanics and switchers, employed by the Employer at its facility located at 6150 South Inkster Road, Romulus, Michigan; but excluding all professional employees, confidential secretaries, leadmen, guards and supervisors as defined in the Act.

CONCLUSION OF LAW

Respondent has not engaged in any violation of the Act.

On these findings of fact and conclusion of law, I issue the following recommended [3]

ORDER

The complaint is dismissed in its entirety.

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[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.